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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1680

IN RE MARY ALICE RELF, MINNIE RELF and KATIE RELF, by and through their next friend, LONNIE RELF, Petitioners

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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I. MR. BELLI'S TELEVISED REMARKS WERE NEITHER RECKLESSLY MADE NOR UTTERED IN COMPLETE DISREGARD OF THEIR FACTUAL ACCURACY.

The instant Petition raises fine and difficult issues concerning the extent to which an attorney may exercise his First Amendment right to express himself freely without fear of civil and professional reprisal. Rather than direct its argument exclusively to these issues, Respondent has sought to repeat and mischaracterize Mr. Belli's expression while minimizing and dismissing his right to make them.

Respondent expends great effort in reinjecting the substance of Mr. Belli's purported "prior misconduct . . . which formed the basis for respondent's denial of the application [for admission *pro hac vice*] . . ." (Brief for Respondent [hereinafter Resp.Br.] at 3-4, 6-7, 13-14, 17) without giving any credence whatsoever to the findings of the Local Administrative Committee of the State Bar of California exonerating Mr. Belli of any professional "misconduct." (Petition for Certiorari [hereinafter Pet.] App. vii-xii).

Inasmuch as the State Bar committee was the only fact-finding body to conduct a formal, noticed, evidentiary hearing on the propriety of Mr. Belli's "Merv Griffin Show" remarks, Respondent's characterization of Mr. Belli's conduct is both gratuitous and offensive and requires that the record be set straight.

It is conceded by all parties that after the three-week trial of *Morris v. Children's Hospital,* Civ. No. 575-71 (D.D.C. Apr. 18, 1973), the jury returned a verdict in the sum of $900,000, which at the time was the largest medical malpractice judgment ever awarded in the District of Columbia. Judge Smith then reversed the jury verdict and ordered a new trial on the ground that the mention of insurance had irrevocably prejudiced the jury.[1] On motion of the plaintiff Judge Smith disqualified himself from sitting on the new trial that he had ordered, and the *Morris* case was settled by counsel for only $150,000

[1]It has always been contended that the subject of insurance in that case was first interjected by defense counsel. See pp. 15-21 of the file copy of the transcript [hereinafter Tr.] in the matter of *Morris v. Children's Hospital* filed by Respondent with the Clerk of this Court.

as the client was unwilling to proceed without Mr. Belli.

Significantly, the committee of the State Bar of California, after an exhaustive evidentiary review of the conduct of the *Morris* litigation, found that Judge Smith had given Mr. Belli a "bad time" during the trial. (Pet. App. xi). In fact, at several points before and during the trial, Judge Smith threatened to appoint a guardian ad litem for the blind minor plaintiff because of Mr. Belli's lack of knowledge of tort law and his "unreasonableness" in not accepting a defense settlement offer of $50,000 to $60,000. Judge Smith has also declared his belief that medical malpractice is an improper matter for a jury to determine.[2]

It was in the context of the revelations concerning Judge Smith's highly prejudicial family relationship —and the subsequent outrage and bitter disappointment of plaintiff's counsel for their client—that Mr. Belli uttered his comments on the Merv Griffin Show.

[2]Deposition of John Lewis Smith, III, *In the Matter of Melvin Mouron Belli,* S.F. 2247, Before Local Administrative Committee of the State Bar of California at pp. 91-92:

Q. Have you and your son ever discussed medical malpractice litigation generally?

A. After this case, not prior to that time.

Q. What have you discussed with your son regarding medical malpractice litigation?

A. Since this, I feel now that there is some other way that these matters should be handled.

Q. What other way do you suggest?

A. I do not know whether this is material. I am perfectly willing to tell you. I think there ought to be a commission or a committee composed of doctors and lawyers to evaluate. *I do not think they really are proper matters for a jury to determine. They cannot possibly evaluate medical malpractice.* [Emphasis added.]

The remarks, moreover, *were* substantially true, and where inaccurate were so in minor and incidental details.

The itemized comparison below between the complete televised statements and the relevant facts persuasively demonstrates the substantial truth of those remarks and the absence of any malicious or reckless element in their utterance.[3]

Mr. Belli's Remarks	Facts
1. "I had one in Washington, D.C. the other day where the judge turned out to have a lawyer who represents all of the hospitals in the district and we were suing the hospitals. It was his son. . . . . I think that judge was wrong in sitting on that case . . . having his son *representing the Medical Association of the District of Columbia.* . . ." (Emphasis added.)	1. The Judge's son was a member of the law firm which represented the District of Columbia Medical Society, whose membership includes 90% of the physicians in the District of Columbia. Physicians who do not become members of the Society cannot obtain hospital privileges or malpractice insurance. In *Morris*, all the witnesses for defendants belonged to the Society represented by Judge Smith's son. This fact was never revealed to counsel for plaintiff before trial. Although Mr. Belli originally misspoke when he stated at the beginning of his remarks that Judge Smith's son represented the hospitals—an error which he readily and repeatedly conceded in the *in camera* proceeding before Judge Gasch (Tr. at 10-11)—Mr. Belli clarified the statement by correctly identifying Judge Smith's son as representing the District of Columbia Medical Society.

[3]The full text of Mr. Belli's "Merv Griffin" remarks are reproduced in Pet. App. viii-x.

Mr. Belli's Remarks	Facts
2. "I had one in Washington, D.C. the other day where the judge turned out to have the lawyer who represents all of the hospitals in the district and we were suing the hospitals. *It was his son and he was living with him.*" (Emphasis added.)	2. Judge Smith conceded to the committee of the State Bar of California during its investigation of this incident that his son lived with him at Tracy Place until as recently as three years before Mr. Belli's "Merv Griffin" remarks. Also, it was admitted that the then current District of Columbia telephone directory listed both father and son at the same address and had never been corrected.
3. "I think the judge was wrong in sitting on that case *when he knew that he had been excused from similar cases against a similar defendant* and then having his son represent the Medical Association of the District of Columbia and living with him." (Emphasis added.)	3. Judge Smith had recused himself in *Wagstaff v. Children's Hospital, Inc.* (Civ. Nos. 1275-72 and 2448-72), a case involving the identical defendant as in *Morris*, after Dr. Wagstaff had "not only authorized" but "instructed" his attorney to tell Judge Smith that it would be his (Dr. Wagstaff's) feeling in view of Judge Smith's son's connection with the D.C. Medical Society that "perhaps it would be better" if the matter were assigned to some other judge.[4] Despite Judge Smith's "standard

[4]The following is a partial transcript of the pre-trial recusal hearing in *Wagstaff v. Children's Hospital*. (Civ. Nos. 2448-72; 1275-72).

MR. McCARTHY (counsel for plaintiff): I received a phone call about ten or twelve days ago from my associate counsel who indicated to me that they had heard that your son was General Counsel of the District of Columbia Medical Society.

They felt it was a matter that they should take up with Dr. Wagstaff and they have taken it up with Dr. Wagstaff and he has not only authorized me, but instructed me to suggest to the Court that it would be his feeling, in view of your son's association with the D.C. Medical Society,

Mr. Belli's Remarks	Facts
	practice" of informing attorneys where there is even the "possibility" of a conflict of interest in a case involving a doctor, Judge Smith neglected to inform Mr. Belli of any of the circumstances surrounding his self-disqualifications in a case involving the same defendant just twenty or twenty-one days previously.
4. "And here was a wonderful thing to see. *Here in Washington, where they [Blacks] couldn't sit on the same side of the courtroom ten years ago.* Now, we're dependent on blacks there to give us justice. And they give good justice."	4. When apprised that his statement regarding segregation in the federal courtrooms of the District of Columbia was erroneous, Mr. Belli apologized and said that he had been under a mistaken impression due to similar practices which existed in the South and due to patterns of segregation which had persisted in the District of Columbia until the recent past. (Tr. 5-9)

that perhaps the matter should be assigned to some other judge.

I am here this morning and I want to note on this record that I am not moving to disqualify or recuse your Honor.

I have never done that and I do not intend to, but my clients have suggested and since they are doctors themselves, it might be better if this Court would disqualify himself in this matter. Thank you.

MR. SCANLON (defense attorney): On that motion, I have really nothing to say. I would rather not see you do.

THE COURT: Actually, Mr. McCarthy, came in and discussed the matter with me.

We went to the Acting Chief Judge.

I think it is probably better. I have anticipated this.

As a matter of fact, I suggested that I should disqualify myself in all medical malpractice cases, but the feeling of the Court was that that should not be done because of the number of these cases pending, but in view of the call Mr. McCarthy received, I think it would be better that I sent it back. [Emphasis added.]

On the basis of these facts, in addition to a complete evidentiary record supplied by all interested parties, the hearing committee of the State Bar of California exonerated Mr. Belli of all charges of ethical impropriety or professional wrongdoing stemming from his televised remarks. The committee measured Mr. Belli's statements against the standards set forth by this Court in *New York Times v. Sullivan,* 376 U.S. 254 (1964) and found insupportable the accusation that Mr. Belli was grossly negligent in making his statement, or that he made his remarks with knowledge of their falsity or with disregard of their truth or falsity. (Pet. App. xii).

Respondent ignores the results of the exhaustive three-day adversary hearing held by the Local Administrative Committee of the State Bar of California. Instead, Respondent asserts that the *in camera* proceeding relating to Mr. Belli's application to be admitted *pro hac vice,* held before the favorable resolution of State Bar of California proceedings, adequately and finally adjudicated the issue of Mr. Belli's professional conduct and right to practice his profession before a court of the United States.

Such an assertion is deeply troubling in its implications. Judge Leventhal spoke to that point when he observed in his dissent below:

> Of course, the District Judge's finding that Belli's statements were 'recklessly made . . . in complete disregard as to the factual accuracy of his statement' is in apparent conflict with the conclusion of the State Bar Committee. However, the District Judge's opinion does not state that the

> standards of *New York Times v. Sullivan* were being applied. Absent some clear indication, I am reluctant to conclude that the District Judge relied on the question whether Belli's remarks are protected by the First Amendment. In any event, it does not appear that the District Judge held an adversary hearing on the matter. *In re Relf*, No. 76-2073 (D.C. Cir. Mar. 3, 1977) Leventhal, C.J., dissenting).

As to the *in camera* proceeding before Judge Gasch to which Respondent attaches constitutional effect, it should be observed that no notice was provided to Mr. Belli that there would be a full and final adjudication on the issue of whether his comments were "recklessly made" and whether he "acted in complete disregard as to the factual accuracy of his statements." While the transcript of that proceeding[5] does indicate a general awareness that the "Merv Griffin" remarks would be discussed, Mr. Belli was never apprised that the purpose of the *in camera* conference was to determine whether he had been guilty of such professional misconduct as to cast him beyond the ambit of the protection of the First Amendment and prevent him from practicing his profession in a court of the United States.

The nature of the proceeding before Judge Gasch in 1973 was thus thoroughly unexpected. Though an

[5]Petitioners were in error when they stated that no record was kept of this proceeding. Because of the extraordinary circumstances surrounding the *in camera* conference with Judge Gasch, Petitioners were simply unaware that a transcript was available or had been made.

informal conference may have been anticipated by the parties, a "hearing" was not. That this informal, *in camera* conference provided the grist for a published opinion in the Federal Supplement is both amazing and inexplicable. The *in camera* proceeding consisted of little more than Mr. Belli seeking to explain the substance of his "Merv Griffin Show" remarks. No written briefs of law were requested; no testimony was taken; no documentary evidence was admitted; no mention was made of *New York Times v. Sullivan* or the First Amendment; and no indication was made as to the burden of proof and who bore it.

Most notably, no reference was ever made during the *in camera* proceeding to the applicable principles of the law against which Mr. Belli's conduct would be judged, or could be judged. It is clear that no hearing that comports with any recognized notion of due process was held. Even assuming, arguendo, that a sufficient hearing had been had, the record could not by any stretch of the imagination support the finding of *In re Belli*, 371 F. Supp. 111, 113-14 (D.D.C. 1974), that Mr. Belli's remarks were made "recklessly" and "in complete disregard as to the factual accuracy of the statements."

Indeed, although Judge Gasch ostensibly appropriated the language of *New York Times* to cast Mr. Belli's remarks outside the pale of protected speech, he failed to provide any of the accompanying safeguards required by *New York Times* before doing so, such as the need to obtain clear and convincing proof that the remarks were made recklessly or in conscious

disregard of their factual accuracy. *New York Times v. Sullivan, supra,* 376 U.S. at 286. To announce, as Respondent does, that the court's finding in *In re Belli, supra,* satisfies the test of *New York Times v. Sullivan* because of its ceremonial use of certain key words is to exalt form and banish substance.

Respondent further asserts that Mr. Belli did have the "full opportunity" to dispute the statements that had been attributed to him, but did not suggest that the statements attributed to him were factually inaccurate. The contention is defective in several respects.

First, Mr. Belli did not have the full opportunity to contest the false charge that he spoke recklessly and in complete disregard of the truth. Mr. Belli was given no notice that he would ever have to meet such a charge at an informal meeting. Further, Mr. Belli was not given a full and adequate opportunity to dispute the factual accuracy of certain statements that are attributed to him. The trial court, and Respondent's brief, have continually ascribed to Mr. Belli the statement that Judge Smith's son represented the hospitals of the District of Columbia. Nowhere in either the opinion, *In re Belli, supra,* or Respondent's brief is it acknowledged that Mr. Belli also correctly identified Judge Smith's son in his remarks as actually representing the District of Columbia Medical Society. By so doing, the context and substance of the remarks have been distorted to suggest that Mr. Belli's only reference to the son was as a representative of the hospitals. This is simply untrue, and to convey such an impression is to attribute to Mr. Belli

statements which he never made and a culpable state of mind which the evidence shows he never possessed.[6]

Respondent's assertion that Mr. Belli had a "full opportunity" to dispute the accusations and put on his whole defense to meet the false charges hurled at him is thus meritless.

II. THE SUMMARY DENIAL OF MR. BELLI'S APPLICATION TO APPEAR PRO HAC VICE CONTINUES TO PUNISH MR. BELLI FOR EXERCISING HIS FIRST AMENDMENT RIGHTS.

Regardless of how one might characterize the *in camera* proceeding held before Judge Gasch in 1973, a court may not punish a citizen either criminally or civilly for exercising rights protected by the First Amendment. *New York Times v. Sullivan, supra,* at 276, 270-280.

The issue squarely before this Court is whether an attorneys remarks, uttered without conscious knowledge of their falsity or in reckless disregard of the truth, should subject him to professional and civil disability where the comments were not made in the presence of the court or during the course of a trial and did not pose an imminent threat to the administra-

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[6]In any event, since no individual was ever mentioned by name, the alleged calumny of Judge Smith seems de minimis to Petitioners even if all the remarks attributed to Mr. Belli were accurate, which they are not. There seems to be more here than meets the eye, and perhaps Mr. Belli's high profile representation of tort plaintiffs through the years, and the adequate awards which he has recovered for them in almost every jurisdiction of this country—except in Washington, D.C., where awards are notoriously low—has generated exceptional sensitivity to the content of his pubic remarks.

tion of justice. Under these circumstances there is *no* authority for the proposition that an attorney's right to speak—or the public's right to hear an attorney—is constitutionally more restricted than that of a citizen generally.

Indeed, this Court has long held that absent an *imminent threat* to the administration of justice, a judge may not punish one "who ventures to publish anything that tends to make him unpopular or belittle him. . . ." *Craig v. Harney,* 331 U.S. 367, 376 (1947); *see also, Wood v. Georgia,* 370 U.S. 375, 389 (1962).

Admittedly, because of an attorney's sensitive relationship to the administration of justice, statements by him may tend to be more imminently threatening than the same remarks uttered by a layman. But the test still remains whether the words posed an imminent threat. Unkind or erroneous statements alone—absent "malice" or disruptive potential—are simply insufficient to support a court's attempt to punish an attorney who publicly criticizes a court. As Justice Brennan noted in *In Re Sawyer,* 360 U.S. 622, 636 (1959):

> We can conceive no ground whereby the pendency of litigation might be thought to make an attorney's out-of-court remarks more censurable, other than that they might tend to obstruct the administration of justice. *Remarks made during the course of a trial might tend to such obstruction where remarks made afterwards would not.* (Brennan, J., concurring). (Emphasis added).

Only when a speaker attempts "to obstruct or prejudice the due administration of justice by interfering with a fair trial" do ethical precepts require abstention from what in other circumstances might be constitutionally protected speech. See *In re Sawyer, supra,* 360 U.S. at 647; (Stewart, J., concurring); see also, *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring); *Sheppard v. Maxwell,* 384 U.S. 333, 363 (1966).

It has never been alleged, nor could it be, that Mr. Belli's televised remarks tended to obstruct judicial proceedings in progress or prejudice the fair outcome of a trial. Mr. Belli's statements were made after the conclusion of the *Morris* trial and outside the presence of the court. The words carried with them no threat of interference with any pending judicial proceeding; no obstruction of any trial; and no spectre of prejudice to any party or legitimate interest.

Respondent's reliance on this Court's recent ruling in *Bates v. State Bar of Arizona,* 45 U.S.L.W. 4895 (U.S. June 27, 1977) for the proposition that an attorney's access to the First Amendment is more restricted than that of members of other professions is thoroughly wrong. This Court forthrightly held in that case that disciplinary rules promulgated by a state bar which interfere with protected speech must yield to the command of the First Amendment. 45 U.S.L.W. at 4903. In the context of commercial speech, and in order to protect unsophisticated consumers likely to be misled by false legal advertising, the Court did, however, suggest more careful regula-

tions might be appropriate for the advertisement of legal services than for other professional services more familiar to the public. 45 U.S.L.W. at 4904.'

III. THE SUMMARY DENIAL OF MR. BELLI'S APPLICATION TO APPEAR PRO HAC VICE DEPRIVES HIM OF THE RIGHT TO PRACTICE LAW IN A FEDERAL COURT WITHOUT DUE PROCESS.

This Court long ago held:

> If in any case, state or federal courts were to arbitrarily refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense. *Powell v. Alabama,* 287 U.S. 45, 69 (1932).

Respondent has conceded that Mr. Belli's application to appear *pro hac vice* was denied summarily without a hearing. In fact, the court refused not only to consider the significant development of his exoneration of charges of professional misconduct by the

'Respondent's reference to *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969) is inapposite. In that case the Court held that it was inappropriate to apply the *New York Times* standard to an employer who violated section 8(c) of the National Labor Relations Act by expressing to his employees views regarding unionism which contained a "threat of reprisal or force or promise of benefit." 395 U.S. at 617-18. The Court reached its decision on the basis of the unique context of the labor relations setting where an employee's fundamental constitutional right to associate freely could only be acquitted by incidentally restraining the employer from exercising his economic preeminence to subvert that right. 395 U.S. at 617. Petitioners fail to see how denying Mr. Belli the full protection of the First Amendment under the instant circumstances will vindicate any countervailing constitutional rights or public interest.

Committee of the California State Bar, but also refused even to permit the filing of a written motion and order on Mr. Belli's behalf. (Pet. App. vi).

Respondent argues that the informal *in camera* proceeding held before Judge Gasch in 1973 in an entirely unrelated matter, and under the questionable procedural circumstances described above, satisfied due process requirements for purposes of denying Mr. Belli's admission *pro hac vice* in the case of *Relf v. United States.* There can be no basis for such an argument.

Two recent federal court opinions underscore the glaring absence of procedural due process afforded to Mr. Belli, even if it be assumed that the *in camera* proceeding of 1973 was sufficient to constitute a hearing for purposes of denying an application for admission *pro hac vice* in an entirely unrelated matter in 1976.

In *Flynt v. Leis,* ___ F. Supp. ___, 46 U.S.L.W. 2029 (S.D. Ohio July 26, 1977) the court held:

> There can be no doubt that admission and removal of foreign counsel are matters within the sound discretion of the trial court. But the exercise of sound discretion can only follow a due process hearing after notice and an opportunity for counsel to defend himself and his professional reputation. There are grave implications inherent in any arbitrary exclusion of counsel. Aside from the obvious immediate loss of income, an attorney summarily removed without cause or opportunity to be heard must suffer an irreparable blow to his professional standing and his future

employment prospects. While the attorneys' interest in reputation alone is insufficient to implicate property rights under the Fourteenth Amendment, it is true that once an "interest" has been initially recognized and protected by state law or the Constitution, a deprivation or restriction of that "interest" resulting in injury to reputation requires procedural safeguards. The attorney's admission to appear pro hac vice was such a property interest and its termination without due process violated their Fourteenth Amendment rights. 46 U.S.L.W. 2029.

In accord is *In re Rappaport,* ..... F.2d ....., 46 U.S.L.W. 2003 (2d Cir. June 14, 1977). In that case the trial judge refused to permit the admission *pro hac vice* of a non-resident attorney to retry a case in which the attorney had been guilty of misconduct. The Second Circuit affirmed the denial on the grounds that first, the judge made his determination after proceedings which carefully protected the rights of the defendant and his lawyer, and a decision not to admit the attorney was amply supported by all the uncontradicted evidence; second, the judge looked to the disciplinary standards of the admitting state and found that the attorney's conduct was such as would subject him to disbarment; and third, the attorney was guilty of unethical conduct during the course of the first trial by testifying in his client's behalf, and would probably have sought to testify at the second trial as well.

By way of comparison, it should be noted that Mr. Belli has neither been afforded proceedings which carefully protected his rights, nor has he ever been

found guilty of any professional misconduct under either California or Washington, D.C., disciplinary standards. There is utterly no legal precedent for denying Mr. Belli admission *pro hac vice* under the circumstances here.

The Fifth Circuit's recent decision in *United States v. Dinitz,* 538 F.2d 1214, 1223-24 (5th Cir. 1976), further confirms Petitioners' contentions in this respect. There, the majority of the court sitting en banc reaffirmed the principles of *In re Evans,* 524 F.2d 1004 (5th Cir. 1975). In finding that the facts before it did not call for the application of *Evans,* the Court in *Dinitz* observed:

> *Evans* merely attempted to establish standards applicable to a *pretrial* motion to appear *pro hac vice . . . Since a pretrial hearing would not interrupt any ongoing trial proceedings, fundamental fairness may require such a hearing in most of these situations. . . . Evans* at least requires an attorney to make some showing to the court that he is qualified and ready to appear *pro hac vice. If the court then decides not to admit him, the attorney may well be entitled, in most cases, to hear the court's reasons for denying him admission and to defend his qualifications at a formal hearing.* 538 F.2d at 1223-24. (Emphasis added.)

It bears repeating that Mr. Belli has asserted before the District Court and the Court of Appeals for the District of Columbia that he is a member in good standing of the California Bar, that he has joined of record a member of the District of Columbia Bar in the case in which he desires and deserved to appear and otherwise complied fully with the applicable local

rule, that he has not been accused or found guilty of any improper or unlawyerlike conduct in relation to the case in which he now wishes to appear *pro hac vice,* and that he has not been found guilty as a result of any formal, regular hearing of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court. In fact, when finally afforded a *full and fair* hearing on his remarks on the *Morris* case, Mr. Belli was exonerated of all charges of wrongdoing. Petitioners reassert that under these circumstances no authority exists in law or policy for the notion that a trial court may exercise its discretion to deny Mr. Belli's admission *pro hac vice.*

IV. CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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